2011 IL App (1st) 102968WC-U

Workers' Compensation
Commission Division
Filed: December 30, 2011

NO. 1-10-2968WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

Workers' Compensation Commission Division

PACTIV CORPORATION, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Jose Sanchez, Appellee).	)	Appeal from Circuit Court of Cook County No. 10L50489 Honorable Sanjay T. Tailor, Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Hoffman, Hudson, Holdridge and Stewart concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held*: The Workers' Compensation Commission's finding that claimant suffered an accident arising out of and in the course of his employment on April 29, 2003, and its finding that the rotator cuff tear was causally connected to any such accident was not against the manifest weight of the evidence; and the Workers' Compensation Commission's finding that claimant provided timely notice was not against the manifest weight of the evidence.

¶ 2 On July 23, 2003, claimant, Jose Sanchez, filed an application for adjustment of claim (No. 03WC36518) pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 through 30 (West 2002)), seeking benefits from employer, Pactiv Corporation, for repetitive

trauma injuries suffered to his right shoulder and left elbow on April 29, 2003. On September 12, 2007, claimant filed an application for adjustment of claim (No. 07WC40829) pursuant to the Act seeking benefits from employer for repetitive trauma injuries suffered to his "right arm (shoulder), left arm (shoulder), back, and neck" on May 4, 2005.

¶ 3 Following a consolidated hearing, an arbitrator found claimant failed to prove he sustained injuries arising out of and in the course of his employment with employer and denied claimant benefits.

¶ 4 Claimant sought review of the arbitrator's decision before the Workers' Compensation Commission (Commission). The Commission issued a corrected decision on February 26, 2010. Claimant conceded in his brief before the Commission that there was no accident on May 4, 2005. Based on claimant's statement, the Commission affirmed the arbitrator's finding that claimant, in case No. 07WC40829, failed to prove he sustained repetitive trauma injuries arising out of and in the course of his employment with employer on May 4, 2005. In case No. 03WC36158, the Commission reversed the arbitrator's decision finding claimant proved he sustained repetitive trauma injuries to his right shoulder on April 29, 2003. The Commission awarded claimant total temporary disability (TTD) benefits in the amount of $470.40 per week for a period of 28 2/7 weeks; permanent partial disability (PPD) benefits in the amount of $423.36 per week for a period of 188 weeks, representing an 80% loss of use of the right arm; and medical expenses in the amount of $113,059.31.

¶ 5 Employer filed a petition for judicial review of the Commission's decision in the circuit court of Cook County. The circuit court confirmed the Commission's decision.

¶ 6 Employer appeals, arguing the Commission's (1) finding that claimant provided timely notice is against the manifest weight of the evidence, (2) finding that claimant sustained an accident arising out of and in the course of his employment on April 29, 2003, is against the manifest weight of the evidence, (3) finding that claimant's current condition of ill-being is

causally related to his accident date of April 29, 2003, is against the manifest weight of the evidence, (4) award of TTD benefits is against the manifest weight of the evidence, (5) award of medical expenses is against the manifest weight of the evidence, and (6) award of PPD benefits is against the manifest weight of the evidence. We disagree and affirm.

¶ 7 The present appeal concerns only case No. 03WC36518. The parties are aware of the facts taken from the evidence presented at the arbitration hearing on March 4, 2009, and they will not be reviewed in detail. Following the hearing, the arbitrator found claimant failed to prove he sustained injuries arising out of and in the course of his employment with employer on April 29, 2003, and denied claimant benefits.

¶ 8 Claimant sought a review of the arbitrator's decision before the Commission. The Commission issued a corrected decision on February 26, 2010. In case No. 03WC36518, the Commission reversed the arbitrator's decision finding claimant proved he sustained repetitive trauma injuries to his right shoulder on April 29, 2003. The Commission awarded claimant TTD benefits in the amount of $470.40 per week for a period of 28 2/7 weeks; PPD benefits in the amount of $423.36 per week for a period of 188 weeks, representing an 80% loss of use of the right arm; and medical expenses in the amount of $113,059.31. The Commission agreed with claimant that his condition "significantly worsened between 2001 and April 2003." Although claimant suffered injuries to his right shoulder in 1997, there was no evidence of a tear.

¶ 9 Thereafter, employer filed a petition seeking judicial review in the circuit court of Cook County. The circuit court confirmed the Commission's decision and this appeal followed.

¶ 10 Employer argues the Commission's finding that claimant suffered an accident arising out of and in the course of his employment on April 29, 2003, and its finding that the rotator cuff tear is causally connected to any such accident are against the manifest weight of the evidence. According to employer, the evidence of record establishes claimant's condition of ill-being resulted from a preexisting condition and is not causally related to his work on April 29,

2003.

¶ 11 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2002). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 605 (1989). "Arising out of the employment" refers to the origin or cause of the claimant's injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989). "In the course of the employment" refers to the time, place, and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366-67, 362 N.E.2d 325, 327 (1977). The question of whether an employee's injury arose out of and in the course of his employment is one of fact, and the Commission's resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Johnson Outboards v. Industrial Comm'n*, 77 Ill. 2d 67, 70–71, 394 N.E.2d 1176, 1178 (1979).

¶ 12 Employers take their employees as they find them. *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 417, 729 N.E.2d 523, 526 (2000). To result in compensation under the Act, a claimant's employment need only be a causative factor in his condition of ill-being; it need not be the sole cause or even the primary cause. *Sisbro Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 673 (2003). "[A] preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36, 440 N.E.2d 861, 864 (1982).

¶ 13 Whether a causal connection exists between a claimant's condition of ill-being and his employment and whether his injuries are attributable to an aggravation or acceleration of a preexisting condition are also factual issues to be decided by the Commission, and unless contrary to the manifest weight of the evidence, the Commission's resolution of such issues will not be set

aside on review. *Sisbro, Inc.*, 207 Ill. 2d at 205, 797 N.E.2d at 673; *Certi–Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244, 461 N.E.2d 954, 958 (1984).

¶ 14 For a finding of fact made by the Commission to be found to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086, 837 N.E.2d 937, 940 (2005). Whether this court might have reached the same conclusion is not the test of whether the Commission's determination of a question of fact is against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440 N.E.2d 90, 93 (1982).

¶ 15 In this case, claimant testified that his duties for employer required that he use a forklift to move 1 1/2 ton dies and to place the dies in the press machines. He aligned each die manually, working above his head for approximately 30 minutes. Claimant used a crowbar to push each die in place. After the die was aligned, claimant affixed four bolts to the die and tightened the bolts with his hands, a process that took about 20 minutes to complete. Claimant worked with his hands at his shoulder level. Claimant testified that he set up one or two dies every day. Each set-up required approximately three to four hours. Claimant worked with his arms above his shoulders throughout the day. Dr. Roger Collins noted that claimant performed fairly heavy labor and that much of what claimant did was repetitive work.

¶ 16 Employer argues that claimant's condition of ill-being resulted from his right shoulder impingement on May 1, 1997, and is not causally related to his work on April 29, 2003. On December 15, 1997, an MRI of the claimant's right shoulder showed a normal cuff with the exception of some increased signal on one cut on the undersurface of the most lateral or distal supraspinatus. Dr. Collins diagnosed claimant with right shoulder impingement and did not recommend surgery. On July 21, 2003, an MRI of the claimant's right shoulder revealed a large full thickness tear of the supraspinatus tendon and Dr. Collins performed right shoulder surgery on

December 12, 2005. There is no disputing the fact that claimant suffered from right shoulder impingement. However, Dr. Collins clearly indicated that claimant's failure to modify his work activities accelerated his problems and need for surgery. Although Dr. Collins advised claimant to modify his work activities, employer did not accommodate the modifications. Dr. Collins opined that claimant may have avoided surgery if he had worked within his restrictions.

¶ 17 Ruby Pressley's testimony was not helpful. She supervised claimant in approximately "2005, 2006." The Commission found claimant "was performing his regular set up duties in the period between 2000 and 2003, and that these duties contributed to his right shoulder condition." Dr. Collins performed right shoulder surgery on December 12, 2005, and claimant did not return to work following surgery.

¶ 18 Based upon the record before us, the Commission's conclusion that claimant's current condition of ill-being arose out of and in the course of his employment on April 29, 2003, is not against the manifest weight of the evidence, as an opposite conclusion is not clearly apparent.

¶ 19 Next, employer argues the Commission's finding that claimant provided timely notice is against the manifest weight of the evidence. The purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident. *Seiber v. Industrial Comm'n*, 82 Ill. 2d 87, 95, 411 N.E.2d 249, 252 (1980). Compliance with the requirement is accomplished by placing the employer in possession of the known facts related to the accident within the statutory period, namely 45 days. *Seiber*, 82 Ill. 2d at 95, 411 N.E.2d at 252. A claim is barred only if no notice whatsoever has been given. *Gano Elec. Contracting v. Industrial Comm'n*, 260 Ill. App. 3d 92, 96, 631 N.E.2d 724, 727 (1994). Because the legislature has mandated a liberal construction on the issue of notice (*Atlantic & Pacific Tea Co. v. Industrial Comm'n*, 67 Ill. 2d 137, 143, 364 N.E.2d 83, 86 (1977)), if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced. *Gano*, 260 Ill. App.

3d at 96, 631 N.E.2d at 727. Here, the Commission determined that claimant gave timely notice. The evidence supports this determination. Claimant testified that he gave a note to the company nurse as well as to his foreman after his visit with Dr. Collins on April 29, 2003. Claimant knew that he "had to give the note" and further, claimant advised "them" that he thought his condition was work related. The Commission's findings with respect to the issue of notice are not contrary to the manifest weight of the evidence.

¶ 20 Employer further argues that the Commission's awards of TTD benefits, PPD benefits, and reimbursement for medical expenses are also against the manifest weight of the evidence. However, since these arguments are based solely upon the premise that the Commission's causation finding is erroneous, a premise we have already rejected, we also reject these contentions without further analysis.

¶ 21 We affirm the judgment of the circuit court confirming the Commission's decision.

Affirmed.